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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

No. 364

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, PETITIONER,

vs.

MISSOURI PACIFIC RAILROAD COMPANY, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS AND BRIEF IN SUPPORT THEREOF.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, St. Louis Southwestern Railway Company, a corporation, respectfully presents to this Court this its petition for a writ of certiorari addressed to the Supreme Court of the State of Arkansas commanding said Court and the Clerk thereof to certify to this Court the record and proceedings of the case in

said court wherein your petitioner was appellant and Missouri Pacific Railroad Company was respondent, for review and determination of said cause by this Court.

Statement of Facts.

Petitioner seeks a review by certiorari of a judgment of the Supreme Court of Arkansas affirming a judgment of the Circuit Court of Pulaski County, Arkansas, reversing an order of the Arkansas Railroad Commission.

August 5, 1930, respondent, Missouri Pacific Railroad Company filed with the Arkansas Railroad Commission its petition for a crossing by a proposed track of respondent over a track of petitioner St. Louis Southwestern Railway Company (R. 2-3), pursuant to Section 8417q1 of 1927 Supplement of Crawford & Moses Digest of the Statutes of Arkansas, as follows:

> "The commission shall have exclusive power to determine and prescribe the manner, including the particular point of crossing and the terms of installation, operation, maintenance, apportionment of expenses, use and protection of each crossing of one railroad by another railroad, or street railroad by a railroad, so far as applicable, and to alter or abolish any such crossing, and to require where, in its judgment, it would be practical a separation of grades of any such crossing heretofore or hereafter established, and to prescribe the terms upon which such separation shall be made, and the proportions in which the expense of the alteration or abolition of such crossings or the separation of such grades shall be divided be-

tween the railroad or street railroad corporations, affected or between such corporations and the state, county, municipality or other public authority in interest. Act April 1, 1919, p. 411, sec. 9; Crawford & Moses' Digest, sec. 1643."

At the same time there was in effect Paragraph 18 of Section 1 of the Interstate Commerce Act, as amended by the Transportation Act of 1920, Section 403 (49 U. S. C. A. Section 1 (18)), as follows:

"(18) Extension or Abandonment of Lines; Certificates Required.—No carrier by railroad subject to this chapter shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire, or operate any line of railroad, or extension thereof, or shall engage in transportation under this chapter over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this chapter shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the commission a certificate that the present or future public convenience and necessity permit of such abandonment."

There was also at the same time in force and effect Paragraph 22 of Section 1, as follows:

"(22) Construction, etc., of Spurs, Switches, etc., within state.—The authority of the commis-

> sion conferred by paragraphs (18) to (21) both inclusive, shall not extend to the construction or abandonment of spur, industrial, team, switching or sidetracks, located wholly within one state, or of street suburban, or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation."

On February 12, 1931, the Arkansas Railroad Commission after hearing held that the Missouri Pacific Railroad Company was not entitled to the order prayed for, and denied the application (R. 77, 83).

The Missouri Pacific Railroad Company appealed to the Circuit Court of Pulaski County, Arkansas (R. 84).

On December 9, 1931, that court found for respondent Missouri Pacific Railroad Company, ordered that the order of the Arkansas Railroad Commission denying the petition of the Missouri Pacific be quashed and further ordered that the Missouri Pacific have a crossing "for its proposed spur industrial track over the spur track of the St. Louis Southwestern Railway Company in North Little Rock" * * * "as prayed for in its petition" and ordered that action in conformity with the finding and order of the court be taken by the Arkansas Railroad Commission (R. 86-87).

May 16, 1932, on appeal by petitioner the Arkansas Supreme Court affirmed the judgment of the Circuit Court, with opinion (R. pp. 91 to 94), holding the proposed track of respondent to be a spur and not an extension of the line of respondent and being a spur only "it was unnecessary to obtain a certificate of con-

venience and necessity for a crossing from the Interstate Commerce Commission before appellee could file its application before the Railroad Commission of Arkansas to fix the place and manner of the crossing" (R. 94).

Petition for rehearing (R. 94), was by the Arkansas Supreme Court on June 13, 1932, overruled. The judgment was stayed June 27, 1932 pending application for certiorari (R. 164).

The question involved is whether the proposed track of the Missouri Pacific is a spur track or an extension.

The proposed track is to begin at present Missouri Pacific tracks in North Little Rock, Arkansas, and is to run south and southeast 4338.4 feet to the proposed crossing of petitioner's track, and thence beyond the crossing a distance of an additional 848.6 feet, or a total of 5,187 feet, to the plant of the Dixie Cotton Oil Company (R. 9-10). See Respondent's "Petitioner's Exhibit No. 1" (R. 69). The cost was estimated at $25,000 or more (R. 53).

The present track of petitioner, St. Louis Southwestern Railway Company now serves the Dixie Cotton Oil Company plant and traffic between Dixie Cotton Oil Company plant and present Missouri Pacific traffic moves over the tracks of petitioner (R. 43). Adequate service is given (R. 43-44). *The proposed track is to serve territory at present served by petitioner.* After crossing one track of petitioner it then is to parallel and adjoin and the old main line or, as it is now called, the industrial lead track of petitioner to the Dixie Cotton Oil Company plant, and by such par-

allel location will physically bar petitioner from access to its territory.

The purpose is to duplicate facilities and service to the Dixie Cotton Oil Company now furnished by petitioner, and the proposal is further to duplicate facilities and service now furnished by the Cotton Belt throughout that district, and in a manner barring petitioner from its own territory (R. 29-31).

The contention of petitioner is that the proposed duplication of service and facilities by the Missouri Pacific comes within Paragraph 18 of Section 1 of the Interstate Commerce Act which requires as a condition precedent the approval of the Federal Commission before any extension can lawfully be made.

The contention of the Missouri Pacific, on the contrary, is that the proposed track is a spur within the meaning of Paragraph 22 of Section 1 of the Interstate Commerce Act, and therefore such approval is not required.

The record shows that the proposed facilities amount to an extension (R. 31-32).

The proposed track is to extend respondent's line substantially into territory not heretofore served by respondent and now served adequately by petitioner (R. 9-68 especially 26-27 and 31-32).

The Circuit Court and the Supreme Court of Arkansas notwithstanding held that the proposed facilities amounted to a spur track and that the Missouri Pacific was entitled to effect a crossing of the spur track of petitioner for its proposed spur track without Interstate Commerce Commission approval.

A railroad company is not required to secure the approval of the Arkansas Railroad Commission for an Arkansas spur track. It is, however, required to obtain the approval of such Commission if the spur track crosses the track of another railroad company. (Section 8417q1 of 1927 Supplement to Crawford & Moses Digest of Statutes of Arkansas). By the Interstate Commerce Act, Paragraph 22 of Section 1, no approval of the Interstate Commerce Commission is required for a spur track.

The Interstate Commerce Commission's approval, however, is required by Paragraph 18 *of Section* 1 *for a track that amounts to an extension. This proposed track is, as stated, an extension.*

Reasons Relied on for Issuance of the Writ.

I.

The proposed track of respondent, being an extension within the meaning of Paragraph 18 *of Section I of the Interstate Commerce Act, the approval of the Interstate Commerce Commission was a condition precedent to its construction, maintenance and operation in the proposed location across the spur track of petitioner and paralleling petitioner's main industrial lead track.*

Without such Federal authority, Arkansas was without power "to fix the place and manner of crossing" petitioner's track with respondent's unauthorized extension track.

Texas & Pacific Railroad Co. v. *Gulf Colorado & S. F. R. R. Co.*, 270 U. S. 266;

Detroit & M. Ry. Co. v. *Boyne City G. & A. R. Co.*, 286 Fed. 540;

Missouri Pacific R. R. Co. v. *Chicago, Rock Island & Pacific R. R. Co.*, 41 Fed. (2d) 190; *certiorari denied* 282 U. S. 866.

WHEREFORE your petitioner respectfully prays that a writ of certiorari be issued under the seal of this Honorable Court directed to the Supreme Court of the State of Arkansas, sitting at Little Rock, Arkansas, commanding that court to certify and send to this Court on a day to be designated a full and complete transcript of the record and all proceedings of the said Supreme Court of the State of Arkansas had in said cause, to the end that said cause may be reviewed and determined by this Honorable Court as provided by law, and that the said judgment of the Supreme Court of the State of Arkansas be reversed by this Honorable Court, and for such further relief as may seem proper.

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MISSOURI PACIFIC RAILROAD COMPANY, RESPONDENT.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinion of the Court Below.

The judgment of the Supreme Court of Arkansas, rendered May 16, 1932, with opinion, is found at pages 91 to 94 of the Record. 49 S. W. (2d) 1054.

The motion for rehearing filed by petitioner was, on June 13, 1932, overruled (R. 95) and the judgment thereby became final (Section 2171 Crawford & Moses Digest of the Statutes of Arkansas).

II.

Jurisdiction.

(1) Jurisdiction for certiorari is conferred upon this Court by Section 237-b Federal Judicial Code as amended by the Act of February 13, 1925, 43 Stats. L. 936.

(2) The date when the judgment became final was June 13, 1932 (R. 95).

(3) Respondent sought from Arkansas under Arkansas Statute Section 8417q1 of 1927 Supplement to Crawford & Moses Digest of the Statutes of Arkansas a crossing over petitioner's track for a proposed trackage of respondent that was to be an extension and as such lacked the required approval and authority of the Interstate Commerce Commission under Paragraph 18 of Section I of the Interstate Commerce Act. Arkansas has nevertheless granted the order sought and thereby denied the Federal right of petitioner under said Paragraph 18 of Section I of the Interstate Commerce Act not to be subjected to such trackage of respondent without prior authority from the Interstate Commerce Commission.

(4) The following are believed to sustain the jurisdiction of this court:

Railroad Commission of California v. *Southern Pacific Co.*, 264 U. S. 331;

Interstate Commerce Commission v. *United States of America ex rel City of Los Angeles*, 280 U. S. 52;

Texas & Pacific R. Co. v. *Gulf Colorado & Santa Fe,* 270 U. S. 266.

III.

Statement of the Case.

It is requested that the statement in the petition be taken as the statement here.

IV.

Specification of Errors.

The Circuit and Supreme Courts of Arkansas erred in their holding that the proposed track of respondent was a spur and in failing to hold that it was an extension, and in failing to hold there was no right to construct, maintain or operate such track without the prior consent and approval of the Interstate Commerce Commission under Paragraph 18 of Section I of the Interstate Commerce Act, and in failing to hold that respondent had no authority to have the crossing in question without such authority for the proposed track.

The Circuit and Supreme Courts of Arkansas erred in failing to follow controlling Federal decisions.

Summary of Argument.

The proposed track of respondent is an extension within the meaning of Paragraph 18 of Section I of the Interstate Commerce Act.

As an extension, the approval of the Interstate Commerce Commission was required before respondent

was authorized to construct, maintain or operate the proposed track extension, or to secure authority from the Arkansas Railroad Commission with respect to a crossing of such proposed track over petitioner's tracks. Arkansas had no power to grant authority for an unauthorized track to cross over petitioner's track.

ARGUMENT.

The record clearly shows as a fact that the proposed track of respondent Missouri Pacific Railroad Company in the district in question was an extension.

The proposed track is 5,187 feet long and to cost $25,000 or more. It reaches the district now served adequately by petitioner—a district new to respondent.

In its proposed location where it would parallel the track of petitioner, the proposed track would furnish a physical barrier to petitioner against its serving its own district.

The situation is one especially requiring that the Interstate Commerce Commission determine whether public convenience and necessity would be served by the trackage of respondent in its proposed location.

The blueprint plat of respondent, Missouri Pacific Railroad Company, entitled "Petitioner's Exhibit No. 1", appearing at page 89 of the record, the evidence of record of respondent's witnesses as well as of petitioner's witnesses disclose clearly that the track is an extension as construed by the Federal courts.

The Arkansas Supreme Court held it a spur.

The Federal courts hold a track of the character of the proposed track an extension within the meaning of

Paragraph 18 of Section I of the Interstate Commerce Act.

In Texas & Pacific Railroad Co. v. *Gulf, Colorado & S. F. Rd. Co.*, 270 U. S. 266, the Texas & Pacific was serving a certain industrial district in the neighborhood of the city of Dallas. The Santa Fe desired to construct a track from its main line to the industries. The air-line distance was only three and one-half miles, but the length of the track would be seven and one-half miles. The Santa Fe contended that the track was a spur or industrial track within the meaning of Paragraph (22) of Section I of the Interstate Commerce Act, while the Texas & Pacific contended that it was an extension as that expression is used in Paragraph (18). In deciding such track to be an extension, this court said:

> "A truer guide to the meaning of the term 'extension' and 'industrial track' as used in Paragraphs 18 to 22 is furnished by the context and by the relation of the specific provisions here in question to the railroad policy introduced by the Transportation Act of 1920. By that measure Congress undertook to develop and maintain for the people of the United States an adequate railway system. It recognized that preservation of the earning capacity and conservation of the financial resources of individual carriers is a matter of national concern. The property employed must be permitted to earn a reasonable return. * * * and that when a railroad inflicts injury upon its rival it may be the public which ultimately bears the loss * * * The act sought, among other things, to avert such losses."

Discussing the meaning of the terms "Spur, Industrial, Team, Switching or Side-tracks" this Court said:

> "Tracks of that character are commonly constructed either to improve the facilities required by shippers already served by the carrier or to supply the facilities to others who being within the same territory and similarly situated are entitled to like services from the carrier. The question whether the construction should be allowed or compelled depends largely upon local conditions which the state regulating body is peculiarly fitted to appreciate. However, the expenditure involved is ordinarily small, but *where the proposed trackage extends into territory not theretofore served by the carrier and particularly where it extends into territory already served by another carrier its purpose and effect are under the new policy of Congress of national concern.* For invasion through new construction of territory adequately served by another carrier, like the establishment of excessively low rates in order to secure traffic enjoyed by another, may be inimical to the national interest. *If the purpose and effect of the new trackage is to extend substantially the line of a carrier into new territory, the proposed trackage constitutes an extension of the railroad within the meaning of Paragraph* 18 *although the line be short and although the character of the service contemplated be that commonly rendered to industries by means of spurs or industrial tracks. Being an extension it cannot be built unless the Federal Commission issue its certificate that the*

public necessity and convenience require its construction. The Hale Cement Line is clearly an extension within this rule."

In *Detroit & M. Ry. Co.* v. *Boyne City G. & A. R. Co.*, 286 Fed. 540, the two railroads intersected about five miles west of Alpine, Michigan. The Huron-Portland Cement Company owned a quarry near the intersection which was already served by a spur track of plaintiff railroad company. The defendant company proposed to construct a tract three and three-fourths miles long from its main line to said quarry. Plaintiff sought to enjoin such construction on the theory that the proposed track was an extension of defendant's line of railroad requiring a certificate of the Interstate Commerce Commission. The Federal court held the proposed track an extension:

> "Considering all of the facts and circumstances of the present case including the proposed operation of entire trains over the proposed track and the main line of defendant in continuous transportation and without switching movements or changes, considering the sidings and public loading stations to be constructed and used in connection with said track, considering the expense of the proposed undertaking, considering the competitive character and results of the contemplated use and operation of said track and trains, considering the fact that the proposed track and train service will be between points where the competing railroad now maintains stations and between which the competing railroad now operates a regular train service, and in view of the entire record, I reach the conclusion that *such pro-*

posed track has the characteristics and constitutes not a spur track but a new line more specifically an extension or a branch line."

In *Missouri Pacific R. Co.* v. *Chicago, R. I. & P. R. Co.*, 41 Fed. 2d, 190 (certiorari denied 282 U. S. 866) the Missouri Pacific proposed to build a track approximately 3,700 feet long in the *City of Little Rock.* The Circuit Court of Appeals decided that a certificate from the Commission was necessary. In this connection, after quoting extensively from the Dallas case (276 U. S. 266) above referred to, the court summed up its conclusions as follows:

> "We think the evidence in the case at bar establishes the following salient facts: That both railroads are engaged in interstate commerce; that the territory of limited area into which the proposed construction is to be projected is already occupied and served to a very considerable extent by the Rock Island; that it is entirely feasible for the whole territory to be occupied and served by the same railroad whenever necessary; that the Missouri Pacific is at present neither occupying nor serving said territory except with one spur track running a short distance south on Collins Street; that the introduction of the Missouri Pacific into this territory will prevent the natural growth of the business of the Rock Island in said territory and may very likely lessen its present business there; * * * When these facts are considered in the light of the principle of railway policy announced in the cases above cited, *we are led to the conclusion that the proposed construction must be held to be an exten-*

sion of the line of railroad of the Missouri Pacific within the meaning of Paragraph 18 of Section I.''

It is worthy of note that in deciding each of the proposed tracks considered in the above cases to be new railroads or extensions, requiring the issuance of certificates from the Interstate Commerce Commission, the courts used as tests such expressions as "when a railroad inflicts injury upon its rival," "where the proposed trackage extends into territory not theretofore served by the carrier," "where it extends into territory already served by another carrier," "invasion through new construction of territory adequately served by another carrier," "if the purpose and effect of the new trackage is to extend substantially the line of a carrier into new territory," "considering the competitive character and results of the contemplated use and operation," "between points where the competing railroad now maintains stations," "that the territory of limited area into which the proposed construction is to be projected is already occupied and served to a considerable extent," "that the introduction of the Missouri Pacific into this territory will prevent the natural growth of the business of the Rock Island in said territory."

The Missouri Pacific proposes to spend $25,000 or more to construct a track to an industry that is already, to all appearances, adequately served by tracks of the Rock Island and the Cotton Belt, and before the track can be built the Interstate Commerce Commission must pass upon the necessity for this

additional facility and consequent expenditure. Moreover, the Missouri Pacific, as shown by its own witnesses, expects to parallel the old main line of the Cotton Belt which is now used as an industrial lead for about 1,000 feet before reaching the Dixie Mill. It will be built directly north of the Cotton Belt right-of-way, where there is a considerable territory susceptible to industrial development, and which will probably be the next territory in that vicinity to be developed industrially. All of respondent's witnesses further testified, in substance, that the purpose of constructing this track is to develop this property and to locate industries to which sidetracks will be built from respondent's proposed industrial lead. The testimony further shows that the Cotton Belt now has a main line lead track adjacent to all of this property from which private industry tracks may be built to any industries that may locate thereon just as well as such tracks could be built from the proposed track of respondent. We do not see how the evidence could make any clearer showing than it does of intention on the part of the Missouri Pacific not only to open up new territory which it does not now serve, but also to invade territory now served adequately by the Cotton Belt both as to service of the Dixie Mill and as to service of the property to the north susceptible of industrial development. There is, of course, no objection to the Missouri Pacific furnishing additional facilities and service for this territory if they are necessary from a public standpoint, but this is a question which, under the Interstate Commerce Act, must be decided by the Interstate

Commerce Commission. Since respondent made no application to the Interstate Commerce Commission, and had required no certificate authorizing it to construct the track, it had no right to construct the track or the part of it to cross petitioner's track.

Under these facts Arkansas failed to follow the controlling decisions of this and other federal courts.

It is respectfully submitted that in this case a writ of certiorari should issue and that the judgment of the Supreme Court of Arkansas should be reversed.

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